FILE COPY

FEB 24

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,
Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

REPLY BRIEF FOR PETITIONERS.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
JAMES W. RYAN,
Counsel for Petitioners Canada Malting Co., Ltd., et al.

Subject Index.

PAGE

The respondent's argument that Canadian law should be applied is contrary to the language of the Treaties involved, and contrary to the well-settled rule as to the law governing torts; while its argument against the enforcement of United States law by United States courts is in conflict with principles repeatedly applied by this Court and is, moreover, wholly unsupported by any ground of necessity or convenience..... 1-13

Table of Cases:

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347..... 6

Avon, The, Fed. Cases No. 680..... 9

Blamberg Bros. v. *U. S.*, 260 U. S. 453..... 6

Charter Co. v. *Bowring,* 281 U. S. 515..... 9

Eagle, The, 8 Wall. 15..... 9

Panama Railroad v. *Napier Shipping Co.*, 166 U. S. 280 .....12, 13

Richelieu Navigation Co. v. *Boston Insurance Co.* 136 U. S. 408..... 5

Western Maid, The, 257 U. S. 419..... 6

Treaties Cited:

Treaty with Great Britain of July 1, 1908 (35 Stats. at L. 2003)..... 4

Root-Bryce Treaty with Great Britain of January 11, 1909, Article I (36 Stats. at L. 2448).....3, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 487.

CANADA MALTING COMPANY, LTD.,

Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 488.

BRITISH EMPIRE GRAIN COMPANY, LTD.,

Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

No. 489.

HENRY K. STARNES, doing business as H. K. Starnes & Company,

Petitioner,

—against—

PATERSON STEAMSHIPS, LTD.

REPLY BRIEF FOR PETITIONERS.

The respondent throughout its brief assumes, as did the Circuit Court of Appeals in its opinion, that if the

United States District Court had retained jurisdiction, this case would have been determined according to Canadian law. Counsel for respondent recognizes (at p. 36) that his entire brief leads to that conclusion. Counsel then states (at p. 36) that "This conclusion is fully supported by the following decisions of this Court," and cites eight cases, none of which involved a collision or tort occurring within the territorial limits or waters of the United States, and in none of which was mentioned the question involved in the present case, namely, whether or not a United States Court, within whose territorial jurisdiction a collision or tort has been committed in violation of United States law, must exercise jurisdiction to enforce that United States law, notwithstanding the circumstance that the tort feasor and the victim happen to be aliens of the same nationality.

In discussing "Canadian law" (p. 37, Respondent's Brief) counsel makes the following statements, none of which is supported by citation of the record or by any evidence in the record:

> "That is the law with respect to which the *parties dealt* and under which they *established their rights* in embarking upon this venture in the realm of commerce; similarly that is the law under which the ships were operated and for the violation of which the masters were held at fault following the disaster." (Italics ours.)

What the record actually shows is that the only "dealing" between the parties (or between the owners of the two vessels) was the tort or collision committed within the territorial limits of the United States; that the parties were strangers to each other so far as any

venture or contract was concerned; that the parties "established their rights" by the municipal or maritime law operative at that place in the United States; that "the ships operated" subject to the law of the United States in force at that place, both because the United States was the only sovereign in that area, and because under the Treaty of 1909 it was provided that British ships should navigate subject to United States law while on the United States side of the International Boundary Line; and that the "violation" of law committed by the master of the respondent's vessel was a violation of United States law.

The respondent makes much of the fact that petitioners' cargo was being carried on the "Yorkton" from one Canadian port to another, under a contract of affreightment made in Canada. It is plain, however, that petitioners' contractual relations with the "Yorkton" cannot have the slightest bearing on their claim against the "Mantadoc", with which vessel they had no contractual or other relations whatsoever. Petitioners' relations with the "Mantadoc" consisted solely of the fact that their property was destroyed in a collision due to her fault. And, if the fact is of any importance, the "Mantadoc", which is the respondent's vessel and the only vessel involved in the present action, was not merely passing through American waters but was coming from an American port, Lorain, Ohio (R. 31), and was therefore engaged in commerce with the United States and voluntarily submitting herself and her owner to United States law, quite independently of her being subject thereto because she was navigating in territorial waters of the United States.

The respondent argues the case as if an alien committing a tort in the United States in violation of United

States law had a privilege inherent in his foreign citizenship to insist that the United States Courts should deprive the injured party plaintiff of any United States remedy by ignoring entirely the United States law applicable in that locality to aliens and Americans alike, and should in effect apply Canadian law by declining to exercise their jurisdiction to enforce the violation of United States law.

The respondent cites no reported case (and we have been unable by diligent search to find one) in which any Court has ever held that an alien committing a tort within the United States is entitled to exemption or immunity from liability for violation of United States law in committing that tort, merely because a law of his own country also condemns such acts by its citizens when committed in foreign countries. Such a law would, of course, have no extraterritorial force in the United States, whatever its effect might be if both parties happened, after the tort had been committed, to return to Canada and sue in a Canadian court. Yet the Circuit Court of Appeals in the present case has given such extraterritorial force in the United States to an assumed Canadian law which even a Canadian court would recognize had no such force in the United States.

The effort of respondent's counsel to characterize the Great Lakes as "high seas" outside the territorial limits of either the United States or Canada is answered by the plain language of the Treaty with Great Britain fixing a definitely marked International Boundary Line, and leaving no area of "high seas" in between. (Treaty with Great Britain of July 1, 1908; 35 Stats. at L. 2003.) That Boundary was fixed by a political act of our government, and United States sovereignty up to that line surely cannot be surrendered by the Judiciary.

In *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, an action was brought by a Canadian corporation on a policy of marine insurance on the Canadian steamer "Spartan," to recover a loss by stranding in a fog "on the southwest point of Caribou Island, in Canadian waters" (136 U. S. at p. 410) in Lake Superior, while the vessel was bound from Passage Island to Whitefish Point on the south shore of Lake Superior (136 U. S. at p. 409). This Court, speaking through Chief Justice Fuller, after stating the case, said (at p. 422):

> "The 'Spartan' was a Canadian vessel and was navigating *Canadian waters* between two Canadian ports, and was bound to comply *with the laws of Canada*. The Canadian Statute put in evidence (Vol. I, Stats. Canada, 1880, p. 236) is entitled 'An Act to make better provisions respecting the *navigation of Canadian waters*'. * * *" (Italics ours.)

The foregoing quotation shows clearly that this Court regarded the waters on the Canadian side of the international boundary as territorial waters of Canada; and that the Canadian law, as proved in that case, was limited in its application, to such territorial waters. As shown by the citations in our principal brief (p. 34), the Canadian law in that respect is unchanged. Accordingly, if the petitioners have no right to sue in the courts of the United States, there is no court in which they have such a right. No court is bound to enforce any law excepting its own; and if the courts of the United States will not enforce the United States law which is applicable here, then the petitioners are relegated to the position of suppliants, dependent for the enforcement of their claims on the mere discretion of the various tribunals to which they may apply. We submit that such a situa-

tion is wholly repugnant to the theory of territorial jurisdiction which lies at the basis of the English and American systems of law, and which this Court has repeatedly affirmed. We submit that under any modern system of law there must be some court in which an injured person has a right to relief; and under the theory of law repeatedly followed by this Court (at least in tort cases), that court is the court within whose territorial jurisdiction the wrong was committed. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Blamberg Bros.* v. *U. S.*, 260 U. S. 453; *The Western Maid*, 257 U. S. 419. If an alien has no right, in the courts of the United States, to enforce claims growing out of a breach of the maritime law of the United States, then, as to him, such law is a nullity.

> "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp" (*The Western Maid*, 257 U. S. 419, 433).

It is true that an injured party has the privilege of appealing to the discretion of other courts than those of the locality where he was injured, but such an appeal to discretion is quite different from the exercise of a strict legal right.

There has not been shown to be (and in fact there is not) any Canadian law which applies at the place of this collision. Accordingly, if there is no enforceable law of the United States, then it would appear that this collision occurred in a sort of legal vacuum, where the parties were not subject to any definite standard of conduct. A surrender by the United States of its sovereignty over the waters in question would not alone be sufficient to meet the situation presented in the present case. It may be assumed that such a

surrender of sovereignty would eventually lead to the exercise of sovereignty, or at least of legislative jurisdiction, by some other power; but, as pointed out by Mr. Hunt in his interesting article (see pp. 15 and 16 of our Principal Brief), Canada still adheres to the view that the waters of the Great Lakes are strictly territorial. She has exercised full territorial jurisdiction on her own side of the boundary line, and has not attempted to exercise any jurisdiction or control on the American side, either as to her own vessels or others. We think it may safely be assumed that Canada will never concede that the Great Lakes are "high seas", in view of the fact that they are accessible to seagoing vessels only by travelling some seven hundred and fifty miles through purely Canadian waters. Nevertheless, it is clear that the decision of the Circuit Court of Appeals in this case may prove extremely embarrassing to the Executive branch of our government in its relations with Canada. Under this head we will only mention the questions which have arisen in connection with the enforcement of the National Prohibition laws.

The suggested difficulty of determining on which side of the boundary line a collision occurred seems to us a reason for taking jurisdiction rather than for declining it. The answer to the difficulties raised by the respondent is that on the Great Lakes no court should decline jurisdiction of a cause where it has jurisdiction of the parties, unless it appears by clear proof that the cause of action arose outside its territorial jurisdiction. If this simple and practical course were followed, the question of the exact location of the accident would never arise unless one of the parties undertook to prove it for some reason which he considered important to himself; and if he assumed this burden he would have

an opportunity to prove his case. Unless the location could be definitely proved, the court would apply its own law, as it does in all cases where there is no adequate proof that a foreign law is applicable. The confusion which the respondent professes to fear can only arise from the court's refusal to take jurisdiction, as in this case.

In this connection it is significant that counsel for respondent, like ourselves, have been unable to find any case where an American admiralty court has ever before declined to take jurisdiction of a case of collision happening anywhere in the world.

The suggestion that the right to bring a suit in our courts is inherent in the right of citizenship and is limited to citizens, is clearly erroneous. If this argument were sound, it would seem to follow that even if the offending vessel had been American, the Canadian libellants might have been denied redress if it appeared that the offending vessel could be proceeded against in Canada. We see no distinction whatever in principle.

The argument throughout respondent's brief is inconsistent with and simply ignores the significant proviso in Article I of the Root-Bryce Treaty of 1909 (quoted at p. 32 of Respondent's Brief) as follows:

> "* * * subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

The plain meaning of the foregoing language is that the maritime law of the United States shall apply to both

British and American vessels while on the American side of the international boundary, provided it applies equally and without discrimination as to both; and similarly Canadian law applies to American and British vessels while on the Canadian side of the boundary. This is not, therefore, a case in which treaty rights intervene, or an action in contract involving the distribution of a fund which is in a foreign country and outside the control of a United States court (as in *Charter Co.* v. *Bowring,* 281 U. S. 515). The cases of *The Eagle* and *The Avon,* quoted at pages 24 and 25 of respondent's brief, obviously cannot be cited as to the effect or interpretation of the Root-Bryce Treaty of 1909, because *The Eagle* was decided in the year 1868 and *The Avon* in 1873.

The scattered *dicta* which respondent's counsel have extracted from opinions and quoted in their brief, to the effect that admiralty jurisdiction in suits between foreigners is discretionary, will be found, on examination of the full opinions, to be but a short method adopted by the court of saying that as the cause of action accrued outside the territorial jurisdiction of the United States courts and under a foreign law, the parties, in certain special cases, will be relegated, for the enforcement of that foreign law, to the courts of the foreign country in whose territorial jurisdiction the case arose, who are charged with the duty of interpreting and enforcing that law. None of the cases cited in respondent's brief is a case in which, as in the present case, the cause of action accrued within the territorial jurisdiction of the court which declined to take jurisdiction, thereby declining to enforce its own sovereign's law. Under such circumstances, even if the case were one of discretion, there is such an abuse of discretion as to constitute error in

law, because the United States court is in substance repudiating the law of its own sovereign.

It is true that petitioners did not argue, in their principal brief, the questions of convenience upon which the respondent lays so much stress. We do not concede, however, that the trial of this cause in Buffalo will cause any inconvenience to any of the parties involved. The respondent has its headquarters at Fort William, Ontario (R. 47). A month or more after this action was begun respondent began an action against the owners of the "Yorkton" at Toronto, more than eight hundred miles east of Fort William (R. 50, 69, 73); and their attorneys are at Montreal, several hundred miles east of Toronto (R. 53, 54). At least one of the libellants also resides in Montreal (R. 41) which is at least a thousand miles from Fort William, where respondent has its headquarters. Accordingly, the suggestion that there is any one place which is readily accessible to all the parties is wholly unfounded. As a matter of fact, Buffalo, where the owners of both the "Mantadoc" and "Yorkton" have vessels calling frequently (R. 20, 73, 74, 76, 77) would be at least as convenient for all parties interested as any place in Canada.

The grounds of convenience which actuated the Circuit Court of Appeals in exercising its discretion, and which respondent urges in its brief, are strange indeed when considered in the light of usual admiralty practice. In collision cases much of the testimony is ordinarily taken by deposition or foreign commission; and in some of the Circuits (as in the Fifth Circuit, at New Orleans) all of the testimony in all admiralty cases is required by long-standing rule to be taken by deposition or commission, so that the trial court hears in open court only the arguments of counsel. When the witnesses are more than one hundred miles from the place

of trial (as very commonly happens), they are, by Act of Congress, entirely outside the trial court's control by subpoena or otherwise, and their testimony can only be taken by deposition or commission. In the present case, the petitioners are the suing parties and under the burden of establishing that the respondent was negligent; and they are not complaining of any suggested inconvenience. The respondent's own officers and crew are certainly under its control and available as witnesses to testify whether the charge of negligence against them is correct; and in that respect the respondent, *on grounds* of convenience, has a great advantage over the petitioners, whose cargo was in the custody of persons who have never been under petitioner's control. Finally, it appears that all the witnesses are sailors, who will normally be on board vessels navigating the Great Lakes, and who, so far as appears, are just as likely to be found in a United States port as in a Canadian port.

Respondent's argument (at p. 25 of its Brief) based on the litigation which grew out of the collision between the "New York" and the "Conemaugh", finds no support in the decision. It was not suggested in that case that the measure of recovery under Canadian law would be different from the rule applied in the United States. Accordingly the effect of any such difference was not considered or decided.

In the present case the lower courts apparently considered that the supposed difference in law was a reason for declining jurisdiction. They seem to have felt that the supposedly more favorable American rule should only be applied in favor of American citizens. They treat it not as an American law but as an American privilege. If the American law is wrong it can be changed by Congress; but so long as it remains in force

we submit that it should be applied impartially, regardless of the nationality of litigants, in all cases arising within the territorial limits of the United States. Surely our courts cannot decline to enforce the laws of the United States on the theory that some other system of law is more just and equitable.

If one Canadian sailor assaulted another in Buffalo, it would scarcely be argued that the victim should be denied access to the courts of this country because the damages recoverable for such an injury under American law were greater than under Canadian law. We see no distinction in principle between such a case and the present.

We will close this brief by quoting an extract from the opinion of this Court in one of the cases cited by the respondent, *Panama Railroad* v. *Napier Shipping Co.*, 166 U. S. 280, 285-6:

> "The fact that the cause of action arose in the waters of a foreign port is immaterial. While in some cases it is said that a court of admiralty has jurisdiction of all torts arising upon the high seas, or upon the navigable waters of the United States, *The Commerce*, 1 Black 574; *Holmes* v. *O. & C. Railroad*, 5 Fed. Rep. 75; *The Clatsop Chief*, 8 Fed. Rep. 767, the connection in which those words are found indicate that they were not used restrictively; and the law is entirely well settled both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.
>
> * * * * * * * *
>
> Indeed, large numbers of collisions arise upon the Canadian side of the St. Clair, Detroit and St. Lawrence rivers, which would not be cognizable

in our courts, if the general proposition claimed by the appellant were true, since by the treaty between this country and Great Britain the boundary line is located in or near the centre of the river.

Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners; at least in the absence of a protest from a foreign consul. *The Maggie Hammond,* 9 Wall. 435; *The Belgenland,* 114 U. S. 355; *The Courier,* Lushington, 541; *The Havana,* 1 Sprague 402; *The Invincible,* 2 Gall. 29; *The Johann Friederich,* 1 W. Rob. 35; *The Charkieh,* L. R. 4 Ad. & Ec. 120; *The Vivar,* 2 P. D. 29; *The Anne Johanne,* Stuart, Vice Adm. 43; *Thomassen* v. *Whitwell,* 9 Ben. 113; *Chubb* v. *Hamburg-American Packet Co.,* 39 Fed. Rep. 431."

If the better opinion is that our admiralty courts should take jurisdiction of a suit between foreigners based upon a tort committed in a foreign country, how can they decline to take jurisdiction of a tort committed in American territorial waters, the national character of which is clearly pointed out by this Court in the passage above quoted?

February 23rd, 1932.

Respectfully submitted,

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
LEONARD J. MATTESON,
JAMES W. RYAN,
Counsel for Petitioners Canada Malting Co., Ltd., et al.